UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JOHN DOE,	)	
	)	Civil Action
Plaintiff,	)	No. 19-11626-DPW
	)	
v.	)	
	)	
TRUSTEES OF BOSTON COLLEGE,	)	
	)	
Defendant.	)	

BEFORE THE HONORABLE DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE

HEARING

* * * **REDACTED* * *** *

August 20, 2019

John J. Moakley United States Courthouse
Courtroom No. 1
One Courthouse Way
Boston, Massachusetts 02210

Kelly Mortellite, RMR, CRR
Official Court Reporter
One Courthouse Way, Room 5200
Boston, Massachusetts 02210
mortellite@gmail.com

APPEARANCES:

Counsel on behalf of Plaintiff:
Andrew T. Miltenberg
Stuart Bernstein
Tara Jill Davis
Nesenoff & Miltenberg LLP
363 Seventh Avenue
Fifth Floor
New York, NY 10001
212-736-4500
amiltenberg@nmllplaw.com
sbernstein@nmllplaw.com
tdavis@nmllplaw.com

Counsel on behalf of Defendant:
Daryl J. Lapp
Elizabeth H. Kelly
Locke Lord LLP
111 Huntingon Avenue
Boston, MA 02199
617-239-0174
daryl.lapp@lockelord.com
liz.kelly@lockelord.com

P R O C E E D I N G S

(The following proceedings were held before the Honorable Douglas P. Woodlock, United States District Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, One Courthouse Way, Courtroom 1, Boston, Massachusetts, on August 20, 2019.

(Case called to order.)

THE COURT: Well, I want to shape this discussion and focus it because we're here on a preliminary injunction. The time period is very tight. And I want to be sure that time isn't diverted to interesting but not material matters.

The first thing that I do want to talk about, though, is a housekeeping matter. The parties have filed this and it's been kept under seal. Judge Young did not act on the sealing motion himself, and I gather the parties wished not to have the emergency judge deal with the matter but kick it over to me, although I was out of town at the time. But I'm not going to seal this case.

Now, how are we going to deal with that? Well, the first order of business is I believe Ms. Beatty has given you the docket. I want the docket to be unsealed as a docket, not access to the underlying materials. That's something that I'll talk about in a moment. And in looking at the docket, but you may have a sharper eye than I for the problems, there are only two filings that might identify the parties here, and I should

note that I do want to proceed by pseudonyms. One is docket number 33, which is an affidavit by a witness, purportedly percipient witness; and number 25, which is an affidavit which by its character I think in particularity would disclose the name of one of the parties here. I propose to have those identified, first, number 25 as affidavit number 1 in support. I realize there are other affidavits in support, but that makes it clean enough. And number 33 would be affidavit number 2 in support.

We'll get to the larger issues here of how we deal with this, but let me just outline briefly. I've said we can proceed by pseudonyms, and I think we should. This is a set of accusations that are not yet final and they have a salacious quality to them that probably should not get into the general mainstream, at least until there's a final determination of the matter. I'd like to have all of the materials that have been submitted redacted. The parties will look to redact it. We'll set a time, time period for doing that, but I'm going to look to the parties to redact with these two principles:

Number one, that the redactions would maintain the pseudonyms or probably use abbreviations, and those pseudonyms and abbreviations can extend to the witnesses involved as well, so that those who were drawn into the investigation are not drawn into something more than they bargained for.

The second is redactions that would reflect in some

way through singularity or particularity to persons otherwise unaware who the parties are. So for example, apart from using abbreviations or pseudonyms like John Doe and Jane Roe, I would assume that the parties would redact things having to do with the, say, extracurricular activities, the identification of the dorm rooms involved, anything that would give someone with a passing interest but not a full understanding of what's going on the opportunity to try to reconstruct who is who, at least at this stage.

But I do all of this because this is now a public matter. Litigation is of course between the parties, but it's also something that the public has a right to know about, in the sense of right to know about whether or not the courts are dealing fairly with matters that are presented to them, and I mean to do whatever can be done without compromising or at least minimizing, mitigating the compromise of the parties and others who are drawn into this litigation.

We'd be blinking reality not to recognize that this is a topic of considerable public discussion, that there have been developments even as recently as the filing of this case through the Haidak case that understandably engage the public in determining whether or not fair process is being used in universities to resolve disputes like this.

So that's a broad outline of what is going to be transpiring here. We'll talk about it in greater detail, but I

intend to proceed in this hearing by pseudonym, and I will try, and I'm sure you will as well, not to make references that would directly or indirectly identify the parties and the interested persons.

The second is this is a motion that I'm hearing as a preliminary injunction. The lawyers will understand what that means. It means immediate appeal under 1292(a)(1). My hope and expectation is to rule from the bench after this hearing so you've got a prompt resolution of what I intend to do, and you can take whatever action you think is appropriate here. But if I allow the motion for preliminary injunction, certainly the college is going to be concerned about that and make its own judgment about whether or not to seek appellate review of that.

Similarly, if I deny it, and we're up against, as I understand it, a Monday deadline, August 26, I don't know enough now and don't even mean to suggest that there's been any kind of dilatory activity by the parties. It's simply taken a long time to get to this point. But there is a kind of last-minute quality of it that requires, I think, me to resolve it by ruling from the bench, unless the plaintiff seeking the preliminary injunction is deprived of the opportunity to have either me or the Court of Appeals order some sort of interlocutory relief while the case, the underlying case itself, is resolved.

I have to say I've read all the submissions as best I

can with some care. I will tell you that in terms of likelihood of success on the merits, the one area I want to focus on because I don't think the other ones work in this setting is a fair process contract claim. I don't like to limit argument on the part of counsel. But, because I read everything that you've said, unless counsel can articulate something that's not in the papers today, as of today, and if they can, of course they're going to tell me why it was or wasn't in the papers that were submitted to me, you've had your argument on these other matters as far as I'm concerned. But I do want to talk about the fair process issues here.

And I think I want to say something in addition. There is in the papers, and some of the case law aids and abets this, a degree of formalism that I think is not helpful in getting to the underlying issues here. I'll start with the distinction between private and public colleges or universities. In this context, at least in the way in which I'm seeing this, I do not see that as a meaningful distinction. Fair process does not necessarily mean of course the kind of process that you get in a criminal case or even in a civil case but it informs, due process informs, constitutional due process informs fair process for private universities. In any event, unless someone tells me that it's absolutely foreclosed, I intend to simply move in terms of fair process.

Now, one of the things that I've been thinking about,

actually mentioned it to my law clerks, is the way in which the development of the law in this area has, I have to say paralleled the old, selective incorporation cases involving the Bill of Rights, the idea that the Bill of Rights applied only to the federal system and not to the state system, and that was fought out for a while, and Justice Black finally won simply because making the distinctions was very difficult on that.

Similarly, what it is that whether private or public universities are supposed to do seems to me to be more or less the same thing. And I would bring to the parties' attention, and it's something that I've read in the manner of a law review article, that the ALI now has a project. A discussion draft has been approved for principles of law for student sexual misconduct matters.

The reason for that I think is that the ALI recognizes that there's a need to kind of try to regularize the law in this area. It's developed and it's probably ripe for that sort of thing. I have reviewed matters that are not yet publicly part of the ALI project but tentative drafts dealing with the question of these kinds of proceedings. I say that it's like a law review article, I'm not bound by the ALI or I'm not holding the ALI out. But it's been useful to me, particularly the reporter's notes telling me where the cases are in this area. And their view, that is, the ALI's or I should say the reporter's view, is that the better practice is for private

universities generally to treat minimum due process standards as governing their dealings with the students because of the educational interest in adopting fair procedures in accordance with widely held procedural norms. That's my view on this.

We can get into the specifics of it, but I don't want to get distracted by that. Similarly, I don't want to get distracted on -- because we don't have enough time to dance on the heads of pins -- over questions of mandatory injunctions or discretionary injunctions, things that somehow have made their way into appellate case law much like a vermiform appendix, not particularly meaningful unless they sometimes explode and poison the case. I want to think functions and facts rather than labels here.

I do think that I need a bit of help on exactly how the process works in the -- what I'll call new process, but the process that was applicable here works now. And it's a little unclear to me, and maybe there's awkwardness in the way in which the rules or principles are set up, but I think I'd like to walk through, at least to some degree, the relevant procedures that are in use by B.C. here.

I understand, I think, the role of the investigators, but I'm not sure I fully understand the way in which the process proceeds after the investigators have done whatever they've done and submitted a report to the dean of students and the student affairs Title IX coordinator.

I'm turning now to Exhibit A, to Ms. Davis' declaration. It's document, I think, number 13. In particular, page 13, the first full paragraph. It says that the final report, that is, the final report of the investigator, here investigators, will be provided to the Office of the Dean of Students and Student Affairs Coordinator for their review and approval, or non-approval? It doesn't say that they can approve or not approve. What is their role and tell me where I can find a reference to it. What is the role of the dean and the student affairs coordinator when they receive this document? Are they obligated simply to approve it; and, if they're not, why didn't they say so in the rule or in the procedure. And number two, what's the standard that they use in evaluating whether or not to approve or not approve? So maybe if B.C.'s counsel can help me on that.

MR. LAPP: Good afternoon, Your Honor. Daryl Lapp on behalf of Boston College. My understanding is that the dean and the Title IX coordinator would be reviewing the report to make sure that it's in order.

THE COURT: What does "in order" mean? That when it says it has 56 pages, you can count 56 pages? I mean, there are various ways in which people do that. I really want to understand are they doing anything other than, "Here is the report, here is what the investigators say, we adopt it"?

MR. LAPP: It's my understanding that they are

reviewing it to see that it's in order in this respect: that the investigators have done what they were charged to do and that they provided a report that is consistent --

THE COURT: Is it a de novo review?

MR. LAPP: Oh, no.

THE COURT: Well, then what kind of review is it? I mean, you know, there are various standards, and one of the problems here, and I will say that the plaintiff's argument with respect -- at least with respect to the investigators and fair preponderance seems to me to be not compelling. The investigators were clear. They were applying fair preponderance. Fair preponderance is here. But then it goes to someone else who reviews and approves. That's the language. It is -- you don't have to agree with me, but it is clumsy, awkward, and creates problems. And so are they -- are the reviewers making a determination to a fair preponderance themselves?

MR. LAPP: The reviewers are not reviewing the investigators' report with an eye toward substituting their judgment for factfinding or anything like that.

THE COURT: Well, let's -- I keep interrupting you, but I want to get to the point that I'm trying to fully understand. Let's assume they look at it and they say, "Boy, they talked to everybody." They say the magic words, "fair preponderance," but there's not enough there there to support

it. Can they decide then not to approve the report?

MR. LAPP: I believe it is within their discretion.

THE COURT: Where does it say it's within their discretion?

MR. LAPP: It does not say that.

THE COURT: Okay. So we have directions with respect to this that are unclear about what the role of the people who issue the relevant sanction order do.

MR. LAPP: I would disagree with Your Honor, respectfully, in this respect. It is very important that the two people who are reviewing this are not just random individuals. They are a person in the dean of students office who is responsible for conduct, procedures, and the Title IX coordinator, whose job it is to make sure --

THE COURT: Let me just say this. People have statuses. They have responsibilities. But that they have the status and the responsibility doesn't mean that they meet them. And so the question is, is somebody reviewing the investigators according to some standard.

Now, my view, I guess, I think again based on my review of the footnotes and the ongoing ALI materials, is that probably substantial evidence would be the standard; that is, that someone looks at this, the reviewer looks at it and says is there substantial evidence to support the judgment of the investigators. That at least would be a tenable position. But

I don't understand that to be the case here. And so I guess one way of asking is have they ever refused to approve an investigator's report.

MR. LAPP: Not to my knowledge, but I'll also freely admit I wouldn't be in a position to know that. I don't know, but I have no reason to think that's happened.

THE COURT: You may get to find yourself in such a position, but the point I guess is that there is this point at which from all that appears there is not an independent exercise of judgment being made by these two people against some cognizable standard. I read their submission to John Doe, and it appears that what they're saying is that investigators have found this, and we're passing it along and approving it, without saying whether or not they do it according to fair preponderance or some other standard, some lesser standard.

I'm familiar with standards because I do it all the time. I mean, there are different standards that I'm directed to, and I try to find according to those standards. I don't displace people, I don't -- if I'm not authorized to do it. I don't do de novo review if I'm not authorized to do it, but I don't know what they're authorized to do. Looking at their submissions, it appears that they have simply passed along as essentially ipse dixit the investigators' report.

MR. LAPP: If I could try one more time, Your Honor.

THE COURT: Sure.

MR. LAPP: It is my understanding what the dean's office and Title IX coordinator are doing is reviewing the report to make sure that the investigators did what they were supposed to do, which is to say follow B.C.'s policies, and that there's no evident violation of Title IX or B.C.'s policies. That is, it would be -- if they were, if they were to see a report, if they were to see a report in which the investigator said -- you know, I'm making this up -- "Doe identified five witnesses that supported him. Roe identified five witnesses that supported her. I interviewed all of her witnesses, and none of his because I didn't think that they would add anything useful," I have every degree of confidence that the Title IX coordinator and the dean's office would take a report like that and say, "You have not done the job consistent with B.C.'s rules and" --

THE COURT: So the --

MR. LAPP: What I would also say to the court, the fact that there is some measure of review for compliance with B.C.'s policies actually makes this a more robust policy than one would see at many schools. The other universities for whom I do this kind of work tend to have policies where someone is the factfinder, they find the facts, and there's no review at all.

THE COURT: Of course they're not before me. But I must tell you that I don't see it anywhere here. What you've

offered is an exercise of pure reason that how could anyone ever approve a report that says, "We talked to only half of the people involved"? But against what standard, I guess.

I look at this and I say, you know, this puts me in mind of that old line from Justice Jackson. It's like a teasing illusion, a munificent bequest in a pauper's will. There is no basis for review at this stage.

Now, that may or may not be good, bad or indifferent. It may be that they just sign off on -- reviewed as to form, I guess is closest to what I do in this sort of thing. The parties submit proposed orders, and I review them as to form without taking a position. But I don't think you can even say that they're doing that. We can't say what they're doing, and they haven't told us what they're doing in their letter here. So I'm trying to figure out what I should do about it, except to say it's just a bump in the road until there's a formal resolution of the matter, but that it doesn't mean anything.

And I'll take a look at this set of investigation reports or more specifically the response that provided the basis for the suspension, and I'm not sure I can find in there anything that they say they did. "They" the reviewers of the investigators' report, but maybe you can help me find that.

MR. LAPP: I don't have anything available to me that Your Honor doesn't have in the sense of --

THE COURT: But you may be able to read it. Look, I'm

not tormenting you. I'm just trying to figure out -- I really am trying to figure out what's going on here, and what are they doing. And maybe in the background they're doing something, but it's not called for by the rule. It says, Review and approve. Ordinarily, that means I do number one, I review; and number two, the only other thing I can do is approve.

Then I look at their communication to John Doe saying, "You're suspended." And I say, "Well, is there something in there that shows me something they did beyond just that they got it and they approved it." I'm not finding it. If you can point me to something, I welcome that.

MR. LAPP: No. I mean, the one thing I can add to that point, Your Honor, is that I do know that upon a finding of sexual assault, the standard sanction at B.C. is a suspension of one year, absent aggravating circumstances that went on --

THE COURT: That goes I think to the question of sanction, which is not the investigator's responsibility but it is the responsibility of the deans there.

MR. LAPP: I'm sorry. I thought you were inquiring about --

THE COURT: I'm inquiring about the basic liability issue. That is, have they subcontracted to the investigators the determination of liability. And I'm told, as long as the papers appear regular, that they've talked to everybody,

irrespective of how well they've talked to everybody, they talked to everybody that is -- the rules are presumed to be subject to approval.

MR. LAPP: The rules could be more clear on this point, but they do speak to the fact that this is the investigators who have to make the findings of fact. The letter that was sent from Dean Kelly to the respondent does say, "I've reviewed the report and I am finding you responsible." I think that is a less than fully artful way of saying, "I have reviewed the findings. The report is in order in the way that we review it, and I am entering the finding."

It is clear under the rules that it is for the investigators to make the findings of fact. And what is implicit, I grant you, not fully explained, is that it is for the dean's office and the Title IX coordinator to review and make some judgment that the work is done in accordance with B.C.'s policies, which include statements about fairness and adequate process and all of that. It is implicit, I grant you, but it is implicit that this stage means something, and it's something other than just, "We're going to look at it and stamp it approved no matter what." It does not mean that.

THE COURT: But it leaves unstated what?

MR. LAPP: It does.

THE COURT: It's the "what" that matters. My own view on this, as I hinted, was that it's probably okay, I would

assume it's fair process to have a kind of substantial evidence evaluation. That may be a term of art that encompasses part of what you said as to regularized kinds of matters. It's drawn from the APA, obviously, administrative procedure, but this is a, let's call it a pockmark in the policies here that doesn't expressly identify what role they play. I do then want to go to the question of appeal, but I'll tell you so you're familiar with what's on my mind here.

The language in Ms. Moore's letter, that's a little bit bothersome. It says that: The investigators' judgments with respect to whether a witness is credible, whether a narrative is reliable and the like are all judgments to be made by the investigators. Nobody else is making those. And that leads me to say that this was simply, apart from the sanction dimension of it, passing through the dean and the Title IX coordinator seems to me to have added nothing to the liability determination. But let me go to that appeal issue.

The standards for appeal, that is, the basis for appeal, violation of procedures -- material procedural error is one thing. But the other is whether the student was able to provide relevant testimony that was unavailable to the student submitting the appeal at the time of the adjudication process. And so I now have what I think I've redesignated as affidavit 2 from a witness who says they didn't ask, he didn't say, and the first that the student found out, that is, John Doe found out

about it, was after the finding. Why isn't that within the scope of grounds of an appeal? Grounds of appeal doesn't say, you know, it was out there and available and nobody found it. It says not known to the student, unavailable to the student. And the state of the record right now, the only thing I have is the student didn't know about it because his roommate, I guess, says he never told him and didn't realize that this was an issue until after the report or after the determination was made. So I don't know how the appeal officer can say that there is not at least a question concerning newly discovered evidence.

MR. LAPP: Well, Your Honor, the standard on appeal is unavailable.

THE COURT: No. It's unavailable to the student.

MR. LAPP: Right.

THE COURT: Not unavailable. That's a standard, frankly, that's used for purposes of criminal trial matters, Brady issues, those sorts of things. This is much more specific. It's much more specific than lots of other schools. Lots of other schools do say unavailable, but they don't say to whom. This one says to whom, and the appeal letter, response of -- I lose track of all these names, I apologize for that -- Ms. Moore, kind of blows by this.

MR. LAPP: Well, I think there's a couple of responses, Your Honor. One is "available" means available

rather than known. And two --

THE COURT: To whom?

MR. LAPP: To the student.

THE COURT: Okay. Is this one of those places in which we just say -- I don't know how we would say this. There's no finding in the record that it was available to the student. Is there? I mean, certainly Ms. Moore doesn't say that. She says whatever information he now claims to have, obviously, was available when he was interviewed.

MR. LAPP: This was a witness who I believe was put forward by Doe, identified by Doe as someone who would have information relative to this case.

THE COURT: But what I have now is I have an affidavit from this witness. Whether I credit the affidavit or not, whether or not this is a recent contrivance or not, I have an affidavit that says, "They didn't ask me anything about this. They didn't ask me what I heard through the walls. I was embarrassed. I didn't tell them. I didn't know that the investigators had taken a position on this or the college had taken a position on this until Doe told me that he had gotten the suspension on this, and I said, 'Oh, you know, I heard this stuff.'" That's what he says.

As I said, I don't know whether that's credible or not credible. I don't take a position on it. This much I do know: that the state of the record, the only evidence of the record

is that it was not available to the student at the time, and that's the standard.

MR. LAPP: And I would submit, Your Honor, I think what Ms. Moore is saying is that in her view the evidence was available to Doe, in that this was a witness Doe had identified as being supportive of his case. He was someone who was interviewed. He was someone who --

THE COURT: But she doesn't say it was available to the student. I'll read it again. "Whatever information he now claims to have obviously was available when he was interviewed." Not "available to you, Mr. Doe." "Available when interviewed." So she doesn't even follow the language of the appeal.

MR. LAPP: I think we need to presume for these purposes, Your Honor, that she's cited, she's quoted directly the standard, and I think with all due respect, we need to assume absent evidence to the contrary that she's doing --

THE COURT: I'd like you to argue appeals and cases in which it's argued that I missed something when I didn't make the findings that are necessary to the Court of Appeals. Because that's not the way it works. The way it works is, if there is some sort of writing and the judge says something, misses something like that, it's a serious matter. The finding does not support a determination that there was no basis for the appeal. That's the problem.

MR. LAPP: And forgive me, but it seems to me like Your Honor is inferring from the absence of the words "to the student" that she was not applying the standard that she herself set out and recited in the document.

THE COURT: Why didn't she say so? Why didn't she say so?

MR. LAPP: I don't know the answer to that question.

THE COURT: The answer to that is pretty important because it's the basis on which somebody evaluates this. That's what I'm getting at.

There may be questions, there frequently are, questions of prejudice, is this prejudicial, that sort of thing that arise with newly discovered evidence. But for purposes of the findings that are involved here, I have two things. I have the investigators' findings. I have the sanction determination made by the dean and the Title IX coordinator, those that they independently make. And then I have the review, appeal review, and I'm trying to focus on did they do their jobs on this and whether the rules themselves are clear enough. One rule says that they review and approve. That's, if nothing else, awkward. And this one says specifically what they must find. And she didn't -- or unless I infer, and "infer" means I re-write this for the benefit of someone who didn't take the time to precisely make the findings that are necessary here.

MR. LAPP: Well, again, I think -- I can't say it any

better than I have, which is that I think it is proper -- I question whether it is proper, with all respect, for the court to infer from the absence of those three words that she applied the wrong standard, which is I think what I hear the court doing.

THE COURT: I don't think so. I guess I'm trying to be indulgent, but this is a critical one. It is the gateway to appeal. You don't get an appeal unless you've got this. Well, you can make claims about procedure, but this one in particular is critical, and there's a neglect to make that finding. Now, that's not the only reason -- go ahead. I'm sorry.

MR. LAPP: Before we move on to a new point, I wanted to make sure we touched on this second part of this new evidence test, which is that it's evidence that not only was unavailable but also would be likely to have affected the outcome. And what she finds is, even putting aside the first prong of the test, Doe has not shown me how this supposedly new evidence would have been likely to change the outcome. He had not provided -- this affidavit is new to the court, not something that was provided to the appeal officer.

THE COURT: Right. It couldn't have been really until -- well, it could have been. I take it back. You're absolutely right.

MR. LAPP: I would think she would have. So what she's saying is you haven't told me what this new evidence

would amount to, and I'm not saying how logically it would be evidence likely to affect the outcome. If it was such unambiguous an indication of consensual sex, how could that not have come out in the interview? The whole point of the interview was for him to share. He was there. He was in the suite. What did you see? What went on? You know, I mean, the notion that he had this spectacularly exculpatory evidence that he didn't share because no one happened to ask him --

THE COURT: I don't think spectacularly exculpatory --

MR. LAPP: I'm sorry. Unambiguous. I'm being a little bit hyperbolic there.

THE COURT: That's a danger in this area. And that is, I mean, something I want to try to guard against by looking carefully at the rules as they are written here.

MR. LAPP: So I words I should have used are "unambiguous." If in fact this person was in possession of unambiguous evidence of consent, and he's being interviewed, the whole purpose of the interview as he well knows is get his view of what might be helpful to this investigation. The notion that he would be in possession of that information and not share it just because he hadn't been asked a question in the proper form, she didn't find that persuasive. Especially without any description from Doe of what this unambiguous evidence was.

And it's also true that the report is full of

information and close consideration about all manner of evidence that Doe offered in relation to his claim that it was consensual.

THE COURT: It is, but let me get back to -- it's lengthy. It's detailed. Whether it's entirely focused is another matter on which I'm not going to opine. But simply saying there's lots of detail doesn't deal with it.

Let's move to this because I want to get to something more fundamental, other than trying to understand these rules, the slip between lip and cup that I think is involved here. The question really is, as to the core issues of those who are percipient witnesses of the encounter, whether or not from my perspective there are adequate grounds for credibility determinations. If we say, "It's up to the investigators," then we're saying they make the credibility determinations. We don't do anything like that.

But there really are three witnesses I think who can be said to be percipient: Doe and Roe and the new affiant. I say "the new affiant" because he's a little bit like I guess the audio version of the fellow in Plato's cave. It's not shadows, it's voices that he's hearing through a wall. But what he hears or says he hears, most recently said belatedly that he heard is something that undermines the credibility of Roe. Some of what she's had to say was that she doesn't recall, which is certainly understandable. On the other hand,

this is someone who says he does. He heard it. And as to something that would be meaningful for evaluation.

So then I go to Haidak because I think Haidak expresses the current understanding of the First Circuit, and it's very carefully -- they don't need to have me say it, but I think it's carefully constructed. And they're talking about real time.

Now, you allied real time with iterative process. That's not what they said. What they said is that there should be real time opportunity, at least for a public university. And I don't think it's really any different for a private university on this issue. And the question I guess I have is, you know, there isn't an opportunity for anybody to do credibility determinations or be led to credibility determinations or someone to make those kinds of credibility determinations except by the investigators doing their investigation.

Why would it not be appropriate -- I won't say "appropriate." Why is it not necessary that at least with respect to percipient witnesses of the core issue that there be an opportunity in real time to hear them testify and make suggestions of questions to be asked? I'm not asking about, you know, a tyro doing cross-examination. I'm not asking whether, if a tyro hired a criminal defense lawyer or some other person who is aggressive in this sort of thing that that

should be permitted, but shouldn't the finders of fact who deal with this have at least afforded the opportunity for real-time examination of the two witnesses at the same point, because they come to rest after two investigation sessions, to be heard simultaneously as they were in Haidak?

The problem here is it's all in the papers or it's leading to what the two investigators found. I mean, subcontracting -- back to my earlier characterization, subcontracting. And I look at Haidak, and I think doesn't that tell us that there should be some opportunity. It can be limited. If there's really a problem with them being in the same room at the same time, they can be in separate rooms. They can do it by video. They can do it the way we sometimes do with child witnesses and they don't have to confront. And confrontation takes on a kind of aggressiveness in all of this.

But doesn't it, at a minimum, require that there be some occasion in which, back and forth, there is examination in real time, not "I took this investigation, did this interview here, and then we heard what the response was and then we did another one and heard what that response is," but at the same time.

MR. LAPP: I don't see anything in Haidak that makes -- I don't see the real-time aspect that Your Honor is talking about.

THE COURT: You know, I look at the way in which you

treated Haidak and I say that's whistling by the graveyard on your part. Haidak is pretty clear. Haidak takes the position here, undoubtedly created in the context of the peculiar qualities of the UMass Amherst setting, but they say that, "We agree with the position taken by the Foundation for Individual Rights in Education as amicus in support of the appellant that due process in the university disciplinary setting requires," quote, "some opportunity for real-time cross-examination even if only through a hearing panel." There was no opportunity for real-time cross-examination. Cross-examination used as the opportunity to ask questions of each of the parties serially.

In fact, the First Circuit is pretty clear that the facilitator, if that's what Ms. Cardoso was, interfered. And they take the position that when the matter turns on credibility -- I'm now turning to page star 12 -- "When the matter turns on credibility and the interests at stake are as substantial as those implicated by an extended suspension, and no perceived exigency exists, a university must do more than presume one version to be correct." And the one version they're presuming to be correct is the investigators', which then goes back to the idea that the investigators are the alpha and the omega of the liability determination. That it's iterative, that you ask one person and you ask another person doesn't necessarily do it, particularly here where there are failures of recollection and changing stories by both parties.

So it seems to me that seeing them in real time together -- that's what "real time" means. It doesn't mean real time serially, it means together, is what Haidak is telling us to do or telling us to require.

MR. LAPP: I would submit, Your Honor, that that part -- and this may be where I need to take the stand, that I do think there is a difference between public and private --

THE COURT: You've been taking a stand all along. A subtle Fabian kind of policy with respect to some issues but you've taken a stand all along.

MR. LAPP: I was going to say take a stand with respect to there actually being a difference between a public and a private institution, and I heard and I took to heart what Your Honor said, that the cases can lend themselves to a certain formalism which you are not attracted to and persuaded by.

I do think it matters here that we are talking about a public institution because the court is talking about a hearing panel. And there is, you know, that line of cases that says that at a public institution, due process requires some kind of hearing.

THE COURT: You mean there's no kind of hearing required here? No opportunity to confront the witnesses? Do you mean to tell me that the difference between a public institution and a private institution is that the overwhelming

or overarching concern that is expressed in Haidak, star 9, "Due process in the university setting" -- not "private versus public" -- "university setting requires some opportunity for real-time cross-examination even if only through a hearing panel." Do you mean to tell me that that's the distinction, that it doesn't require it in the private institution?

MR. LAPP: I am suggesting that I do think that entire sentence matters because the --

THE COURT: I'm sorry. The entire --

MR. LAPP: The entire sentence matters.

THE COURT: Sentence.

MR. LAPP: The sentence that Your Honor has read matters. Because if that entire sentence is to be read as setting the standard for every serious conduct proceeding at every private university, then I think Your Honor would say the First Circuit is telling us there has to be a live hearing, and that is, that would be a fundamental departure from all of the cases that we've cited in our brief, which are to the point that, you know, what fairness requires in a university setting, at least with respect to private universities, is basic fairness, as that concept has evolved, which means some kind of notice, some kind of opportunity to be heard, and a decision that is not arbitrary and capricious, that has some grounding in the evidence.

I submit, Your Honor, that if the First Circuit meant

to hold that every serious student conduct matter at every university, at least in Massachusetts or maybe in the entire First Circuit, requires a live hearing, that would be a departure from precedent that the court would address explicitly.

THE COURT: I'm not sure that they think that they haven't. So let me take it a bit further, which is to say, in this area, the idea of fair process, which is implicit in the contract law of Massachusetts -- or not implicit -- explicit, the First Circuit ever since Judge Campbell in Loud has recognize that, and now we've been evolving to what does that mean? Does that mean that there's a full range of things? No, it doesn't. Does it mean something like a criminal case? No, it doesn't. But do we depart as a private university, a public university over this issue? I see nothing that suggests that that's what they've said. They don't say that. They say that, "Due process in the university" -- not the private and not the public university -- "in the university disciplinary setting requires some opportunity for real-time examination, even if only through a hearing panel."

And, you know, the larger point is on the end of that page I guess it is, just before the paragraph before star 10, "When a school reserves to itself the right to examine witnesses, it also assumes for itself the responsibility to conduct reasonably adequate questioning. A school cannot both

tell the student to forgo direct inquiry and then fail to reasonably probe the testimony tendered against the student."

Now, what they've said is some opportunity for real-time cross-examination. Does that mean that the format that B.C. has, you know, newer version of its rules, is deficient? It may in the context of genuine issues of material fact that go to credibility. It's one thing for investigators to make determinations on the basis of undisputed facts, but that's not this. This is -- maybe it's not lots of cases like this, but in any event, it's not this. This case is one of ambiguity, I guess is the best way to describe it. The evidence is ambiguous on this.

I would never grant summary judgment on the basis of the submissions that I've received here because it's not sufficient. There are questions of credibility. And now we're saying we're going to "subcontract," is my phrase, credibility to the investigators. That's essentially what you're saying, right?

MR. LAPP: I think here, what real-time examination consists of is a real-time, engaged examination of the witness by the investigators, which is to say an active -- what the First Circuit is talking about here is we don't want there to be just acceptance of one side's story. We want the complainant's story to be probed, to be viewed with appropriate skepticism in the way that we mean that, that there is a

testing of the complainant's story and an exploration of the potential flaws in that story, including an exploration that is informed by input from the respondent in the case.

THE COURT: Does the respondent in the case here get -- I'm sorry, sounds like I'm yelling it, but we're having some problems with the redevelopment of our audio system here. But does the respondent in the case under the B.C. process have the opportunity to review the statement of the complainant before the determination is made as to whether or not there is responsibility?

MR. LAPP: Yes, yes.

THE COURT: How?

MR. LAPP: Through the evidence binder that is provided to both parties at the conclusion of the evidence-gathering phase. The respondent -- the respondent actually gets notice -- obviously, he gets the initial notice of what the charge is, which is cryptic. Then, through the back-and-forth interview process, there is sharing with the parties of what the other is saying.

THE COURT: Is there? I mean, do they say, "Ms. Roe said this. What do you say to that?"

MR. LAPP: Yes.

THE COURT: How do I know that?

MR. LAPP: You don't probably have that in the record.

THE COURT: All right. I mean --

MR. LAPP: That is the reason for the iterative process of back and forth --

THE COURT: I'm familiar with FBI investigations, which are iterative, I can assure you, but they don't -- they make their choices about whether they say we've got a witness who says this. That's not -- what I don't have here is what one expects, which is that you've got a chance to see them in real time together, however you frame it, shape it, so that you don't artificially create the very thing that you're most concerned about, which is recreation of an unhappy, to say the least, event.

MR. LAPP: One can see -- I want to more properly state what I said just a moment ago. There's not a place in the record where it is specifically stated that the rule is we share what we get from the complainant with the respondent and vice versa in the iterative interview process, but you can see that from reading the report. You can see from the description of the first interview of Roe, the first interview of Doe, the second interview of Roe, the second interview of Doe. You can see that iterative process play out so that we can see in the record Doe having been apprised of and having an opportunity to respond to what the complainant is saying and to suggest questions for the investigators to ask.

He then gets -- then both sides get, when all of the evidence has been assembled, an evidence binder, which collects

summaries of all of the interviews that have taken place and all of the other evidence that's been collected. And that is provided and an opportunity given to respond to that. And the investigators can pursue whatever follow-up, if any, they think is --

THE COURT: All on paper. All on paper.

MR. LAPP: The evidence binder is on paper, and the submission from the complainant and respondent at that stage is on paper.

THE COURT: So if someone raises a question of credibility, says, you know, you ought to be able to see them with the sweat dripping down their upper lip, the factfinder should be able to do that. That's the nature of credibility. People make credibility determinations. I don't do it that way, but I've heard others do. Here we don't have that, or maybe we do. We just have it for two people. We are leaving it to the two investigators to make all of the determinations in the case, apart from sanction. And I don't understand sanction to be at issue at this point. It's a result that follows from it, but nobody's told me this is an improper sanction if the finding of liability is made, so I'm really focusing on finding liability.

But I can't get away from the understanding that we have said we're leaving it to the investigators to make this determination. However awkward maybe the review process is by

the dean and the Title IX administrator, you said if it's in order, that doesn't sound to me like an independent determination of credibility, so it's all left to the investigators. There have been investigative cases. There are investigative cases. I do have to say that the ALI development now is, when credibility is a central issue, there should be an opportunity to allow the complainant to put questions in real time to evaluate it and that that's probably required by due process and fair process. I haven't come to a final determination, but that seems to be where they're going and that seems to be the development in this area.

MR. LAPP: On that point, Your Honor, the First Circuit in Haidak has said that specifically is not required.

THE COURT: "Due process in the university setting requires some opportunity for real-time cross-examination even if only through a hearing panel." I would say they suggest the opposite of what you suggested to me.

MR. LAPP: I'm sorry, Your Honor. I thought Your Honor said that the ALI was putting forward the proposition that the parties would --

THE COURT: No. They're going -- I put this party stuff to one side. A party doesn't get to do it directly. That's not a necessity of due process as far as I'm concerned because of the countervailing concerns, but there is some need for real-time cross-examination even if only through a hearing

panel, and to the degree that there is a credibility determination to be made as to the core issue. The Sixth Circuit seems what I'll call latitudinarian about this, that they get to cross-examine everybody. No, that's not what the First Circuit has said. But they have said that they expect under these circumstances that there's an opportunity for real-time cross-examination.

Now, I think your response to that is to say that's when there is a hearing process as opposed to an inquisitorial process; that if you've got an inquisitorial process, you insulate yourself from -- you, the institution -- insulate yourself from the duty to provide the opportunity to have such real-time cross-examination.

MR. LAPP: I think I'm saying two things. One is that insofar as Haidak talks about examination at least through a hearing panel, I think that language should be construed to apply to public institutions, not privates.

THE COURT: Where do they say that, number one?

MR. LAPP: They don't.

THE COURT: I shouldn't invoke the ALI because this is, you know, in the process. But I will say that, based on my reading of all the materials, that they support -- because I try to read as many of the cases I can -- I think they have it right about where the law is coming on this. And it is to say that fair process and due process in this context may be more

or less parallel.

MR. LAPP: Again, I would submit, Your Honor, that it would be a drastic departure from any guidance we've got from the First Circuit or from the SJC to this point to say that, at a private institution, a hearing is the only way that you can decide student conduct cases of any significance.

THE COURT: That's not what I'm saying. I'm saying that this proposition is the one I'd like to have tested. When credibility is at issue with respect to the core question of sexual misconduct, that is, what was the encounter, then at least the two participants in that conduct or two participants in the encounter should be -- there should be an opportunity for real-time cross-examination. And I think I might take it further, particularly in the peculiarities of this case, to say that goes to anybody who is a percipient witness even if it is with his ear to the wall to hear what he hears in the next room or says he hears.

I couldn't -- I find it very difficult to believe that one could make a realistic determination without that, that people schooled in the process of dispute resolution would do it without that.

MR. LAPP: Well, I would submit, Your Honor, that there are reasons why the majority of schools I believe have moved away from a hearing model toward an investigative model.

THE COURT: But you're assuming that the hearing model

and the investigative model are the Law of the Excluded Middle, that, as a consequence, it's only in the hearing model that you get the opportunity for real-time cross-examination. I'm not sure that that's true. And what I'm suggesting is that perhaps a rule that focuses on credibility determinations is one that requires, that necessitates this further process. How that panel is organized, how it's done, I don't know. This much I know is with all respect to the investigators, two supernumeraries, subordinates, are making this fundamental determination, and it's just being shuttled down the road first to a dean of students who says, "Looks okay to me," if I hear your analysis correctly, and, "By the way, we'll have an appeal, but we won't make the findings that are necessary to show that an aspect of a percipient witness's testimony, belatedly found, is going to be considered."

MR. LAPP: The decision, Your Honor, has to be made by somebody.

THE COURT: Right.

MR. LAPP: And B.C., like many schools, has decided to take the factfinding away from amateur panels of --

THE COURT: It doesn't have to be an amateur panel.

MR. LAPP: -- students and faculty and anyone else who was doing these panels in the past and put this process in the hands of investigators who are trained to do this work and have some specialization in this work and can do it in a way that is

thorough and effective and not constrained by, you know, a hearing before a panel on a Tuesday afternoon from 1:00 to 4:00.

THE COURT: Or to be bothered with making credibility determinations the way we ordinarily make determinations in disputed matters.

MR. LAPP: The way we make credibility determinations is by examining witnesses, questioning them in an active way and judging them in real time by their answers to probing questions. And what the -- in fact, if I may, Your Honor, in fact, this investigative process is a better process in many ways for the John Does of this world than a live hearing process. Rather than being required to react in real time and submit questions in real time in some process, he's afforded disclosure of what the opposing testimony is, the opportunity to reflect on it, the opportunity to consult with counsel about it, the opportunity to come back with proposed questions about it. It is a more deliberative, full, robust process in many, many ways than a hearing, a live hearing.

THE COURT: Well, just --

MR. LAPP: And a if --

THE COURT: I may, let me -- that's like saying summary judgment is the same; in fact, it's better, because you get to see the papers and you get to respond to the papers and you leave it to the judge to make the determination. That's

not how I conceive credibility. And saying it's better for him or not better for him, it doesn't quite capture the missing link in this, which is, we've got a disputed issue of fact. What do we do about disputed issues of fact? Do we leave it to supernumeraries? That's your characterization of -- my characterization of them, and your characterization of what the process is, I think. Or do we have some opportunity for real time, real time, not "real time" used in the various almost chameleon-like ways in which you've defined "real time." Real time cross-examination, even through a hearing panel, that is, the questions being asked by someone else.

MR. LAPP: If we take the facts, the specific facts of this case, right, what did Doe contest? What did he want the investigators to cross-examination Jane Roe about? "I tell you that she said, 'Kiss my neck.' I tell you she said to me, 'Just do it.' I tell you she moved her underwear aside. I tell you she said after the penetration began, you know, 'Hold it there,' et cetera, et cetera. What about that? Ask her about that. How does she explain that? There was discussion of a condom. What does she say to that? How can she explain that? How doesn't that absolve me?"

Every question that Doe had was put to her in a probing way and considered in a thorough way, completely consistent with what I submit are the core principles of Haidak for these purposes at a private institution, that we don't just

accept one side, that we cross-examine, albeit not through an adversarial model, inquisitive model, and that cross-examination is conducted with input from the respondent.

We have not -- I hear what Your Honor is saying, but what I'm not hearing is what's the question that Doe would have had the investigators ask, or some panel, some hearing panel ask in real time --

THE COURT: Isn't that the problem?

MR. LAPP: -- that wasn't asked?

THE COURT: Isn't that the problem? You didn't ask. You didn't provide the opportunity. What's the question? Provide the opportunity and find out. This much is clear, that there is a credibility determination that's being made in a particular way, and it's being done in a fashion that excludes for the evaluation of credibility and the follow-on questions, which could include, you know, the evolving story or the degree to which there are lacunae in her recollection. That's one way. Similarly with him. But to say, "We asked all the questions that we could. What other questions would he want?" There's one way to find out.

MR. LAPP: With respect, Your Honor, he was offered that opportunity. He had ample opportunity.

THE COURT: Not in real time. That's what we're talking about.

MR. LAPP: And I guess the question I'm trying to

ask -- this seems backwards that I'm asking the questions. Forgive me -- what is the difference, what's the difference in terms of basic fairness from Doe saying to the investigator, "You know what? The next time you talk to her, you should pursue with her the condom, the shorts, et cetera, et cetera, et cetera, because I think all those facts are really important, and I don't think she's got a good answer." What is the difference in terms of basic fairness from the investigator taking those questions and then probing Jane Roe extensively about it as we can see from the report, as opposed to having done that in a single setting where the investigators, I guess, are shuttling from room to room. Because as the court says --

THE COURT: No --

MR. LAPP: -- we don't have to have what looks like a trial. We don't have to have people in the same room. We could do it all kinds of different ways. What is the difference between running back and forth room to room and saying, "Well, here's what she said. Is there anything else you want me to ask her?" What is the difference between that from a fairness perspective and the process that was afforded here, which meets the Haidak tests of, you know, engaging in active factfinding, not accepting the complainant's account, giving the respondent notice of what the testimony is against him, allowing him to be heard after the complainant testifies, which happened here, and examining the complainant in a manner

reasonably calculated to expose any relevant flaws in her claims.

All of that happened, and the fact that it didn't happen immediately in real time as opposed to the investigators cross-examining her in real time, not just taking written submissions from her but actively examining her, I don't see the denial of fairness to Doe in that, particularly where we have cases saying like Havelick that a court should not substitute their judgment for universities in relation to the procedures that they have.

THE COURT: Somebody has to make that determination. It certainly can't be the investigators. We don't subcontract that. The courts make the determination with respect to what's a fair procedure, and it may be that they give broad range. They have, in fact. But now it's closing in. And it's closing in because of the sense of inherent unfairness that's created when there isn't the opportunity for credibility determinations by someone other than people who are hired to do investigations. This is really quite fundamental, I think.

MR. BERNSTEIN: Your Honor, may I just --

THE COURT: One at a time. That's the whole purpose of this.

MR. BERNSTEIN: I apologize, Your Honor.

MR. LAPP: I think what's also central to Haidak is the endorsement of an inquisitory model. Even though there

happened to have been a hearing in Haidak because it was at a public institution, and that's how UMass does it, what the court fundamentally is endorsing is an inquisitory model as opposed to an adversarial model. That's what they describe the process to be.

THE COURT: They do, and they say it's defective in that regard. I mean --

MR. LAPP: Well, they upheld it.

THE COURT: Oh, no. To say that they upheld it doesn't quite capture what was done in this setting. What they effectively are saying is that for certain kinds of purposes, there remains a case. It's a seven-month case, whatever that's worth. It's worth at least nominal damages under 1983 kind of --

MR. LAPP: Sure.

THE COURT: Yes, I guess it would be 1983. But the First Circuit is not wholly embracing by any means the inquisitory model. You know --

MR. LAPP: Just if I may -- I'm sorry.

THE COURT: They say that schools may reasonably fear various kinds of cross-examination, but they say this is not to say that a university can fairly adjudicate a serious disciplinary charge without any mechanism for confronting the complaining witness and probing his or her account and then go on to say real-time evaluation. I mean, maybe it's a hybrid.

Maybe it's not. Maybe it's any of those things, but the real problem is whether or not that is -- you've put your finger on it. The real problem is whether or not that is a necessary component of this kind of evaluation.

MR. LAPP: And I think here is where I would point to the language at star 10 of the case where the court, after expressing reservations about the way UMass handled this case, they say, you know, as it turned out, the members of the board nevertheless managed to avoid pitfalls created by the university by questioning the complainant at length, probing for detail, requiring her to clarify ambiguities, you know, describing various specific questions and by alternating questioning, which was done here through the iterative process that we have.

It's a different way of skinning the cat, but in both cases you see the university fundamentally skinning the cat in a fair way which allows for all those things that we know are core to basic fairness under Massachusetts law. You know, notice of what you're up against, opportunity to present evidence, and here now amplified by Haidak, a process in which there is active cross-examination and probing which can be done by inquisitors, not just adversaries. When I say the court is endorsing an inquisitory model what I mean is they depart from Doe v. Bond, the Sixth Circuit case, and say we don't agree that you need to have adversarial cross-examination.

THE COURT: That's not this. The real issue here is whether or not this imports the idea that there will be a neutral and detached decisionmaker who will be exposed to real-time examination. What happened in Haidak, you say they would in Haidak, through no help of the institution. The institution made it much more difficult to make this work out. But it did work out because of the way in which it was structured.

MR. LAPP: I want to come back to one point quickly, if I can, Your Honor, I'm a little bit concerned about your concern about these -- I'm not sure exactly how you put it, these investigators who were hired to do this factfinding.

I don't see anything in Haidak that speaks to that, much less precludes it. This is where I was trying to make the point earlier. The decision has to be made by somebody.

THE COURT: It does, and according to some process. And so the somebody are, I said supernumeraries but in the sense that they are subordinate individuals, not subordinate in the sense that somebody directs them to do something or to take a particular partisan view, but subordinate personnel. There is -- you know, do we permit the clerk to make determinations about factfinding, skilled subordinates? No. We have neutral and detached magistrates who do that sort of thing. Some are Article III, some are Article I, but we have that.

Now, here what we have is a pretty clear statement on

the part of the First Circuit that real time is necessary, real time informed by real-time questions by the individuals. Ms. Cardoso tried to squelch it, but in fact the amateur board managed to ask all of the relevant questions. But I think I understand your position on this. I assume that you're not -- I say "I assume." Is there anything else in a preliminary injunction aspect that you want to be heard on? Because I will hear from your brother in his good time.

MR. LAPP: I would like to address the harm issue briefly.

THE COURT: I mean, are you really saying that it's not a problem when you get suspended from B.C.?

MR. LAPP: Absolutely not, absolutely not.

THE COURT: Okay. So it is a harm. And here we have some development of difficult to liquidate damages, but we've got the beginnings of that in affidavit number 1, is it? Don't trust me on which number it is, but the affidavit here. Are you really pressing that?

MR. LAPP: I am pressing the issue, Your Honor, whether there is a harm here that is irreparable and not compensable by monetary damages. That is the point that I am pressing.

THE COURT: How do we figure monetary damages for someone who has his career interrupted at a time when it is uncertain what that career is going to be? I mean, that's

traditional for irreparable harm; that yes, there can be compensable damages, but if we can't figure out some meaningful metric or reliable metric, then the idea of irreparable harm becomes less formal than it is in other kinds of settings.

MR. LAPP: I would submit, Your Honor, that we've seen a pretty good preview of what that presentation is going to look like in Doe's affidavit himself where he talks in specificity about [redacted].

THE COURT: He's trying to address this issue. What it leaves me with is I don't know what it's worth, and neither does he. And we can't tell when at a critical juncture in somebody's career they have the opportunities that are afforded [redacted] interrupted. Put to one side stigma and all of that sort of thing. It doesn't quite catch up with you.

MR. LAPP: And I would simply appreciate the court's indulgence to hear me on the harm issue briefly. We've cited to the court cases that say that [redacted], that that has not persuaded other courts --

THE COURT: Some have.

MR. LAPP: -- by in large not persuaded other courts to see that as an irreparable harm that justifies injunctive

relief. And if we view this as a career opportunity case, and we're talking about the one-year delay in the commencement of a career and perhaps some diminution of even the likelihood of pursuing that career, we've got courts saying that these are things that can be remedied by compensatory damages, especially the one-year delay. And I would submit to the court that one thing that is important to note is what the latest affidavit -- now I've forgotten the number -- from the expert doesn't say, which is that it does not say that without an injunction he will never be able to pursue this career. But what the affidavit says is there will be an impact. We don't dispute that. There could be a significant impact. We don't dispute that. [redacted]. No question these things could be harmful to Doe. We don't dispute that.

What we do vigorously dispute is that that's not entirely susceptible of remedy by monetary damages. And that is -- I think that is our key point on the irreparable harm issue.

The other point I wish to make briefly, Your Honor, is that it's also entirely speculative that the injunction, if granted, would solve Doe's problem. There seems to be an assumption here on the other side that if the injunction is granted, no one will ever know what has happened to bring us to this point. The injunctive relief that they seek is a stay --

I forget the -- stay the suspension or temporarily vacate the suspension, let him back in school and let him resume the extracurricular activity that is central to him.

But what we've also heard [redacted]. They're going to want to know where he is. They're going to -- they care about character. They ask questions about character. And if we -- if B.C. is enjoined to take him back, [redacted] going to come around and ask how are things with him, this [redacted]. And they ask [redacted] not just how is he [redacted]. They ask how is it going academically? How is it going in school? The [redacted] can't un-know what he knows and is going to have to answer that question in some way. And the best way that he can answer it for Doe is unfortunately going to be seen as evasive. And so the flag is going to be up, we submit --

THE COURT: Well, there's an unseemly problem presented by that characterization, and it's this: You've harmed him, and you can't unring the bell; and as a consequence, he's going to continue to be harmed.

Now, that may be recoverable in some sort of damages to his character, hedonic damages of certain kinds, maybe not. But to say that, "Too late, we can't do anything about it. He's going to be suffering no matter whether we send him back or not," is to say there's no effective injunction in this case. I guess that's what you're saying. And what I'm abjured

I think to do is do the best I can to minimize the harm to the individual, not to permit the harm to continue in the form -- if it's improper, in the form.

But you raise the point I was going to start with your brother on, which is, what do you want? Because if what they want is to simply make the injunction or make the suspension go away, that's not what's happening. What's happening is that there are problems with the procedures.

So what do we do? We have a new hearing? We have new decision-makers? What is it that they want that's going to give them some benefit? And does that happen during the middle of the school year? And does that mean that, come November -- because now there's all kinds of materials that's out there -- come November, the suspension kicks in and makes it impossible for him to come back, not just this year but half of next year?

You always have to be careful of what you ask for. And that's particularly true in the context of injunctions. But I take your point. Aspects of it are just a little bit bothersome to say, "We've really inflicted harm that's indelible, and not much you can do about that, Your Honor. Don't do anything."

MR. LAPP: I certainly didn't mean to say it that way. I think the point I was working around to is I think in weighing whether to grant injunctive relief, one of the things the court does of course is weigh the equities and weigh the

public interest. One important interest that we haven't touched on yet is the interest in, you know, the outcome that B.C. got to and how it impacts Jane Roe. If injunctive relief is going to be ordered, then he's back on campus with her, which has an impact on her, as we've noted in our papers. And it's in that regard that I think it's appropriate for the court to take into account in balancing the harms, you know, how likely is the injunction really to solve those problems relative to some problems that occur with the junction being granted. That was the point I was working toward. Thank you.

THE COURT: So let's start with that because it works its way back to the questions.

MR. BERNSTEIN: I'm sorry; what, Your Honor?

THE COURT: It works its way back to the question I'm going to ask you. What do you want? I mean, stay-away orders? They stay in place?

MR. BERNSTEIN: Yeah. The stay-away orders stay in place. Our client is back on campus. [redacted] and the lawsuit proceeds through its normal channels.

THE COURT: Can't they go forward with a revised form of evaluation of him?

MR. BERNSTEIN: Well, Your Honor, to my knowledge there has not been a case reported in the country on that issue, because I've had that discussion with other judges in Pennsylvania on this exact issue. I had a preliminary

conference two years ago against Penn State, and that exact issue came up. What would have to happen is B.C. would have to vacate all the findings. It would have to do a new investigation.

THE COURT: Why would they have to do a new investigation? If what's evolved here is what I've identified as, well, two things. One the lack of real time -- "real time" as conventionally understood "real time" means -- examination, and second an appeal that addresses correctly the terms and conditions of the appeal. It may be satisfied by the first one, which is providing real-time examination of Doe, Roe and the new person.

MR. BERNSTEIN: Your Honor, respectfully I think there is another large issue that Your Honor has not touched upon, and I don't know if that's because Your Honor doesn't find it as important as we do, but there's a fundamental of notice --

THE COURT: I don't. You're right; I don't. That's the silliest of the arguments you've made. It's clear here what's going on. They're talking about penetration in terms of penetration. No surprise to anybody. Anybody who says that they were surprised by it isn't paying attention to the documents that are involved. So if you want to press that in light of my observations about it, go ahead.

MR. BERNSTEIN: Can I have 30 seconds on it?

THE COURT: 30 seconds?

MR. BERNSTEIN: 30 seconds. Your Honor, their statute is tantamount to a statutory rape statute where consent cannot be given. So they found our client not responsible for the alleged rape because they had no knowledge, our client had no knowledge that she was incapacitated. And by their own statute, incapacitation cannot give consent. However, in trying to fit the round peg into the square hole, they said that she gave consent to making out and gave consent to other things. It is a fiction, Your Honor, there is no way she would have legally given consent.

THE COURT: What you said in your letter is the reality is that the code makes clear that a reasonable person in Doe's situation would not have known that, one, either she was incapacitated; or, two, was not consenting to the behavior, she's not responsible. You understood that there were two lines of attack here. You went back to them to say that. This is pre-1938 code pleading at best.

MR. BERNSTEIN: I will leave it alone as I understand, Your Honor. But going back to, Your Honor, as to what they're entitled to do. I don't know that if they violate someone's rights that they can just go back and unring the bell.

THE COURT: But they're not -- see, they are simply the decisionmaker. The point with respect to Ms. Roe is valid. Both sides are entitled to a fair process. That B.C. stumbles doesn't mean that your client gets the benefit of no further

evaluation of his conduct.

MR. BERNSTEIN: Judge, maybe they will set up some kind of process which they have not in place. They don't have any. So obviously this is not going to happen tomorrow.

THE COURT: No, it's not going to happen tomorrow, but I suspect depending on how this plays out that it's going to happen this fall. And I'm likely to, if they have a fair process, say, "Okay, that's a fair process," and that's my role. My role isn't to evaluate the bona fides of this dispute or the credibility of this dispute. So if you think you're home free that you found -- that if I make a finding that they've made a mistake that nothing more happens, you're wrong.

MR. BERNSTEIN: No, Judge, I'm not saying that. I'm not saying -- if you issue the preliminary injunction today, I am not for one second saying that the game is over, without a doubt. We intend to have to go through the process and where that process takes us. And we are confident obviously based on the facts and circumstances that, if given a fair hearing and a potential that based -- because there's only -- Your Honor, what I can agree, and I think Your Honor would agree with me, that the charge of incapacitation is gone. They can't go back and recharge him on that, so we're left with the consensual allegations only of consensual --

THE COURT: Pause for a moment. Mr. Lapp, any question about that? I mean, we're dealing with due process

perhaps and not larger constitutional questions of --

MR. LAPP: Double jeopardy. No, no.

THE COURT: They've made a finding that you've been satisfied with, they don't dispute, about incapacitation.

MR. LAPP: Correct.

THE COURT: So now it's down to lacking consent, at a point at which they're supposed to.

MR. BERNSTEIN: And Your Honor, we are, obviously given the two choices of a suspension starting on Monday and his career absolutely gone, yeah.

THE COURT: Not absolutely gone. I mean, this is --

MR. BERNSTEIN: Well, Your Honor --

THE COURT: Please. You know, the hyperbolic qualities of all of this is really a bit much.

MR. BERNSTEIN: Your Honor, if I just may, just because I do have --

THE COURT: Perhaps you can, after I complete -- or maybe you don't want to hear what I have to say. Go ahead.

MR. BERNSTEIN: No, Your Honor. I apologize.

THE COURT: You can go ahead without the benefit of understanding the things that are on my mind. Go ahead.

MR. BERNSTEIN: I apologize, Your Honor.

THE COURT: Go ahead.

MR. BERNSTEIN: Your Honor, as the expert indicated, [redacted] indicated, and that we have personal knowledge

[redacted].

The finding of a sexual allegation of a violation of B.C.'s policy based upon the expert's opinion and based upon my knowledge, personal knowledge of the [redacted], he [redacted]

THE COURT: But that's not resolved by the stay of the suspension. Because if there is further proceeding, as I anticipate there will be if I find this, then this is going to occur during the time period that he's subject to [redacted] and this kind of evaluation. And there is a point that everybody has to recognize that I gave Mr. Lapp a little trouble about, but I think is true, that the mere fact that this proceeding went forward is harmful to your client, particularly if it's found that he's not responsible under

whatever process is necessary. But that's where we are. [redacted] well, that's what they've decided to do. Swinging from one side to the other on [redacted] having a kind of evaluation of character that includes unproven allegations, that's where we are. But that, it seems to me, is quite apart from the question which you I'm sure have talked about with your client. That, you know, life is tough, it makes hard choices. And the hard choice is go forward with this and try to get it resolved.

But to say, you know, the world is going to come down on him, that it's a certainty he's going to get picked, all of that stuff, you simply can't say. It may be that the changes we've seen in society's response to this kind of issue are swinging back in another direction from simply accepting allegations to requiring a fair process to evaluate that, and that will lead to some further adjustments and mere allegations or unproven allegations or allegations that are rejected. But I'd simply deal with the circumstances as they exist.

MR. BERNSTEIN: Yes, Your Honor. And again, in response, if given obviously the choice of a suspension going into effect on Monday and the preliminary injunction being issued and sometime down the road, whether it's the fall or the

winter, of having to face a fair hearing and to be able to present evidence and cross-examine based upon the facts of the case as we know it, my client is comfortable to take that opportunity and chance that he's going to be successful in front of a neutral panel. And so, yes, so I understand that Your Honor is saying that if you issue the preliminary injunction, it is far from over. And down the road, whether it's a month, two months, three months, four months, he still may face the same fate. I am confident that my client would like that opportunity to face that fate and face a live neutral panel down the road.

THE COURT: Well, you say "a panel." Does it have to be a panel?

MR. BERNSTEIN: Well, Your Honor --

THE COURT: Here is the point that Mr. Lapp was -- one of the points that I think he was making, which is to say -- I've been making references to language that I think is instructive to me on what should be done. But they have a process. They followed the process. There are limitations in the process perhaps on it. But what a suspension with a follow-on would mean is that they have the opportunity or you're enforcing on them that requirement that they provide a hybrid of their process. They used to have a hearing. Now they changed. Now they don't have a hearing. There are pros and cons to both of them as mechanisms, but what you've asked

me to do, I think, is to say that, until they produce a hybrid on this, they can't enforce a suspension.

MR. BERNSTEIN: Well, Your Honor, you indicated that they used to have a hearing. The fact of the matter is at B.C. they still have hearings.

THE COURT: They have it for things other than sexual misconduct.

MR. BERNSTEIN: Right. So they can certainly conduct a hearing if they want. But what also what Haidak talks about, and it's in there, You Honor, you talk about neutral. I think the facts of the case -- I'm not going to go through them with Your Honor -- I don't believe those two individual investigators were neutral. And counsel was taking about, Well, they did the spirited cross-examination. They went back. I don't think that's factually correct.

THE COURT: You don't have a case of partisanship. If you read --

MR. BERNSTEIN: Your Honor --

THE COURT: Maybe it's there. Maybe it's not. You haven't made it. These, I've referred to them as supernumeraries simply to identify their role in the hierarchy of the university. But there's no indication here that they were in the tank on this. I mean, there isn't. They did what they thought their job was. You don't like it. I understand that. And as someone who makes decisions, I'm fully familiar

with the idea that it was not that those who were adversely affected think it was not merely a bad decision but somehow partisan or corrupt, you don't have it here.

MR. BERNSTEIN: Your Honor, if I could make three quick more points. First, with regards to irreparable harm, what I notice is that defendants provided a declaration of Dean Kelly for some issues, but what they didn't produce, and I believe because it would not be helpful to their case, is an affidavit from [redacted]. I think [redacted] -- and I say I know that because I have information and belief of my client speaking with him, [redacted]would certainly -- and if we had a hearing, Your Honor, we would have been calling him here, would certainly substantiate my client's [redacted] and the fact that of this --

THE COURT: Did he decline to give you an affidavit?

MR. BERNSTEIN: Your Honor. If I --

THE COURT: Yes or no?

MR. BERNSTEIN: He was told by B.C. not to.

THE COURT: You say that he was instructed not to give an affidavit?

MR. BERNSTEIN: Not to talk to my client, correct.

THE COURT: That's a different issue.

MR. BERNSTEIN: Well, yes, it's my understanding that that they talked to him --

THE COURT: Would you say he was a partisan?

MR. BERNSTEIN: I'm sorry, what, Your Honor?

THE COURT: Would you say he was a partisan? Someone who would like a good [redacted] to continue [redacted]?

MR. BERNSTEIN: Your Honor, if we want to talk about the word "neutral," I think he's completely neutral. He's a B.C. employee. If he's no longer [redacted] --

THE COURT: Right, he doesn't have the benefit of your client's services. I mean, here is the point about that. Maybe getting that affidavit is going to be helpful or would have been helpful at the summary judgment -- at the preliminary injunction time period, but we're there. And we've been there since you told Judge Young that you would prefer to have the judge -- I gather -- the judge to whom this case was assigned do the case. And of course I was out of town at the time. But Judge Young was prepared to deal with this case at this time.

So you've had all this time, and this is the first I've heard that there was an interference by B.C. with your ability to induce evidence. Maybe that's true; maybe it's not true. I don't know. But in any event, I'm dealing with the record before me at this point.

MR. BERNSTEIN: Your Honor, actually, I apologize. Maybe I didn't say it correctly. What I was pointing to with the fact of [redacted] is the fact that B.C. didn't get -- because they're saying it's speculative and all the things

about my client. They didn't get an affidavit from [redacted] against my client. That was the point.

THE COURT: Neither side of that works. I have to tell you it's just not -- now we're on this, which is, I think, focused by the idea of, I give you the suspension stay, but you're not home free on this. And then it becomes a question of -- putting to one side appeal, which I consider to be very live. I started this hearing by saying that this is appealable is right. The time period has been crunched, but that's the parties' choice.

In any event, put to one side the question of appeal, formulating what this new hybrid is going to be is going to be an issue. I'm not imposing anything other than to say that real-time examination of potentially percipient witnesses as a prospect, but I don't know what that looks like. It's different from what they've decided to have. And I think I want to be very careful about doing that. I'd have to approve it. I would look to the parties to present me with something that's reasonable as a way of dealing with this kind of thing. Reasonable. Not hyperventilating, but reasonable.

MR. BERNSTEIN: Your Honor, if I may, just one last aspect, one of the arguments counsel was talking about, the harm to Roe. And I think it's very important, Your Honor, this allegedly occurred on November 4, 2018. The complaint was made officially I guess on December 7, and then on December 10 said

I want to go forward. At no time did B.C. take any interim measures against my client, in which they fully have the right to do in their policy, even if the complainant doesn't want it, if they felt he was a danger or anything. So that didn't happen, so I think it's a little disingenuous now to say they're worried about Roe because he finished the semester in December. He came back in January. [redacted] He finished the semester in the spring of 2019 with no issues, with no allegations that he violated the stay-away, of nothing. So I think it's -- you know, I think the status quo, certainly if it worked for seven, eight months from November of 2018 to May or June of 2019, I certainly believe it can work going forward.

THE COURT: Well, I think I understand the force of that. Let me ask one final point. Why did it take so long to have the affidavit number 2 -- I'm not sure I have the numbers right, but the affidavit of the roommate?

MR. BERNSTEIN: Your Honor, you say "too late." I mean, we got the finding, the denial --

THE COURT: You knew as of June 24?

MR. BERNSTEIN: No. July 24, Your Honor.

THE COURT: July 24?

MR. BERNSTEIN: And we filed the complaint July 29.

THE COURT: Yeah, but Doe knew that he was going to be -- that he was to be suspended when?

MR. BERNSTEIN: Well, the appeal -- end of June --

THE COURT: When did he know that he was to be suspended, apart from the appeal?

MR. BERNSTEIN: I think it was June 24, Your Honor.

THE COURT: Just a moment. And when did he tell his roommate that he faced that?

MR. BERNSTEIN: I believe the affidavit said on June 26.

THE COURT: So since June 26 until end of last week, so two months. Now he does know of this evidence, this additional evidence. And the affidavit comes in after the appeal period and just on the eve of the trial. Why?

MR. BERNSTEIN: Well, Your Honor, we were not counsel on the appeal. There was another attorney. I believe it was just strictly because of the way the case was going. I mean, we weren't getting an affidavit. We hadn't drafted -- we hadn't filed the complaint. We hadn't made a motion for preliminary injunction.

THE COURT: You knew at that time. There was a time at which you knew about this evidence and learned -- because he told his roommate about the circumstance, and the roommate made some noises about -- they're in his own affidavit -- some noises about, "Well, that's not exactly how I remembered it." But you didn't get an affidavit from him until the eve of this hearing, and I'm asking why. And the answer may be you've got

a reluctant debutante you're dealing with in the affiant, I don't know. But I am interested in this. Because, you know, someone who comes -- the question goes to equitable matters. I've raised the issue that they have, that is, B.C. has not met its own standard for newly discovered evidence, didn't indicate that it had to be newly discovered by the respondent. On the other hand, this late disclosure may affect my judgment about what kind of injunction should be issued.

MR. BERNSTEIN: If I may, Your Honor, with regards to the appeal, Doe put in an affidavit pretty substantial information of what this witness would say.

THE COURT: When was this case filed?

MR. BERNSTEIN: July 29.

THE COURT: Right.

MR. BERNSTEIN: So from July 29 forward, Your Honor, we were, maybe rightly or wrongly, presuming that there was going to be a hearing and live testimony.

THE COURT: Why would you think there would be live testimony? I don't deal with live testimony on this kind of thing. My role is procedural. I'm not substituting my judgment for the investigator. I'm listening to the question of whether or not this is consistent with what I call fair process. But I'm not going to say, "Let me hear from the roommate to tell me about what he heard through the walls."

MR. BERNSTEIN: Your Honor, I can only give you the

most direct, truthful, simple answer. As I said before, two years ago in Pennsylvania in front of Judge Brown, I conducted a three-day preliminary conference -- preliminary injunction hearing. So my personal experience, where we had five witnesses, was that I had a hearing.

THE COURT: On the substance of the charge?

MR. BERNSTEIN: Yes, Your Honor. I can give you the chapter --

THE COURT: No, no. I don't need to see because I have no right to do that, none.

MR. BERNSTEIN: Well, I was in Williamsport in the middle of the -- we left the day the Little League World Series was beginning. Judge Brown issued his decision on August 18, on a Friday, and my client was starting his program on Monday. It was a three-day -- a two-and-a-half-day hearing in Williamsport, Pennsylvania. So that's my personal experience. That's what we had.

THE COURT: Yes, but that's the equivalent of saying, "Do you believe in infant baptism?" "Believe in it? I've seen it done." That doesn't answer the question of whether or not it's proper -- whether it meets the standards here.

I don't understand that a judge sits to review, unless it's dealing with something just wholly arbitrary, sits to make these credibility determinations, a judge like me, sits to do it. Other judges may think that and, you know, certainly

sometime I'd like to learn about it, but I'm a little under pressure right now.

MR. BERNSTEIN: Your Honor, that was the reason, and then when you came back and we were advised that there would not be a hearing --

THE COURT: What do you mean? What do you think this is?

MR. BERNSTEIN: Well, I consider this oral argument on the motion. I guess we're talking about semantics, Your Honor. So that's why we then got the affidavit, because we would not be having live testimony.

THE COURT: But you submitted affidavits before when you filed the case.

MR. BERNSTEIN: When we filed the complaint?

THE COURT: In your motion in support of preliminary injunction, you've got affidavits, don't you?

MR. BERNSTEIN: I don't believe so. I think the affidavit 1 came with our reply --

THE COURT: I know when it came, but I was provided with an order to show cause, with Ms. Davis' affidavit in support. It's a collection of papers here. I've been provided with paper. That's what the parties understood this case to be about, whether or not there was fair procedure. So I ask that. I'll have to consider it.

MR. BERNSTEIN: That is the answer. Because based on

my own experience, there was a hearing, and that's why the affidavits 1 and 2 came in subsequent when we found out there would be no hearing. What I'm calling a hearing as compared to oral argument on the motion which happened for the last two and a half hours today.

THE COURT: Okay. So I want to take just a few minutes to reflect on it. As I said, I'll rule from the bench with respect to the motion because you're entitled to as prompt a resolution as it's been teed up for me. And you can take whatever steps you want to take, although I do want to at least shape where this case goes from here, irrespective of what other avenues are pursued. So we'll take maybe ten minutes' recess.

COURTROOM CLERK: All rise.

(Recess taken 3:59 p.m. to 4:26 p.m.)

THE COURT: Well, as indicated in the discussion that we had, I find this a very challenging case in part because the law is developing in this area, but I think that it is developed enough and has given me sufficient direction that I feel comfortable enough granting the motion for preliminary injunction to the extent of staying the suspension of John Doe here.

I'll try to explain as best I can, understanding that in the best of all possible worlds, I'd have a considerable amount of time to draft a lengthy memorandum. But as

frequently is the case, this is not the best of all possible worlds. We have time deadlines on us, and it's my obligation to rule.

What's the framework that I use? The framework is the traditional framework for preliminary injunctions. It's a four-part framework that involves an assessment of likelihood of success on the merits, a balance of hardships, probably a five-part determination here because there are three different types of hardships. There's hardship to John Doe. There's hardship to Jane Roe. There's hardship to the institution itself that I have to balance. And then I have to consider a larger question of irreparable harm.

There are various formulations that are developed for purposes of preliminary injunction analysis. I think the best, from my perspective, is that it is the obligation of the judge sitting in equity to balance the considerations inter se. It's possible that one can find cases because one can find cases saying almost anything in the preliminary injunction area that each of those considerations is to be considered equally. I don't think so. The overarching consideration is likelihood of success on the merits.

Nevertheless, I must consider the other factors to the degree that they may cabin the exercise of my equitable powers. I start them with likelihood of success on the merits. I've framed, constrained perhaps, the hearing today to deal with

that portion of the complaint that John Doe has made that deals with what I'll call fair process. I use fair process because that resonates with Massachusetts law that deals with fairness in contracts, and we can see a development of that analysis going back at least to Lowed, Judge Campbell's opinion, through Judge Saylor's opinion in Brandeis. But this much is clear: that for present purposes, the considerations of due process that I have in mind that apply more specifically and directly to public institutions are equally applicable in this context, to the private institution that is B.C. That's not to say that I'm assimilating the two but simply to say that, for purposes of the kind of process that seems to me to be deficient, it applies equally to Boston College and to a public institution.

The other claims I've put to one side because they don't seem to me to be likely to have success on the merits in any event. It seems to me important to focus on the core issues in this case.

So what do we do with likelihood of success on the merits? What's the core consideration here? It is how it is that credibility determinations are made when we're dealing with claims of sexual misconduct. There are two basic prototypes that have been developed by universities, and B.C. has used both of them, continues to use both of them in different settings. The one we broadly call inquisitorial. The other we call some sort of hearing process.

I think it is artificial to speak in those terms, particularly in the wake of Haidak. I treat Haidak as a matter of considerable significance here, that is, at least my reading of Haidak. Haidak is an evaluation of the question of what you do when you're confronted with genuine issues of material fact as to which a credibility determination has to be made on the fundamental issue. The fundamental issue here that remains in the case is whether or not there was unwanted sexual misconduct on the part of John Doe.

There are disputes of fact about exactly what happened. The respondent, Mr. Doe, has some recollection, doesn't recall other things, disagrees with more that Jane Roe says. Jane Roe has candidly indicated lack of recollection with respect to certain things. This is in any other context the stuff of a credibility determination by a factfinder in the form of what Haidak refers to as a real-time cross-examination.

Now, it's not cross-examination that I have in mind that's of a type that one used to see anyway in criminal cases, particularly rape cases. But it is the opportunity to observe together and ask questions or ask that the factfinder ask questions with respect to the core issues. The deficiency here, fundamental deficiency here that I see is that the B.C. process didn't provide that, didn't provide a mechanism for that. That's a fundamental deficiency in the wake of Haidak, I believe.

Now, I've pointed to certain shortcomings in the B.C. process. One of them is the uncertainty about what it means to pass on to the dean of students and the Title IX administrator the determination made by the investigators. One could read the language of the protocol here to indicate that the powers of the investigator are total, absolute, not subject to review. The language says "review and approve at the next step." It doesn't provide a standard.

What is clear here is that the credibility determinations are being made by the investigators without the benefit of real-time cross-examination that may consist of questions that are asked by the parties, to be asked by the factfinder here. They didn't do it because it wasn't called for here. It's not really reviewed because the review is said, at best, to be as to form, whether it was regular. One would think that, if there is going to be review, the review would be on some sort of standard like substantial evidence. But that's not here.

So we have the investigators making those kinds of determinations in seriatim questioning of witnesses. The developing case law in this area, and I made reference to the ALI's developing project on the way in which educational institutions deal with sexual misconduct allegations, satisfies me that Haidak is an important statement on the part of the First Circuit about what is fundamentally necessary when there

is a disputed question that can only be resolved on the basis of credibility. Certainly the two principal parties involved in the encounter, John Doe and Jane Roe, should be subject to some form of real-time examination with questions to come by their adversaries. It's not necessary that it be done in the way that it's done in the courtroom. It's not necessary that it be done by lawyers for them or even by them themselves. In fact, that might not be a good idea. But some mechanism for that real-time evaluation, it seems to me, is necessary; and in its absence, the process is deficient.

I've touched on the problem of appeal here. It's of a piece with the problems that -- the fundamental problem of the lack of real-time investigation that I've alluded to. That is, that the rule itself wasn't followed. The assertion is made that there was available certain information by yet another real-time witness that wasn't timely brought forward, but the rule requires that it be available to John Doe himself, and that's not what the appellate evaluation accepts. So what we see in the appellate evaluation is basically a further deference to the role of the investigators without any critical analysis of what they've done.

One of the things that is a matter of concern to me generally is that this failure draws me into at least the position of developing yet another formal resolution process for B.C. It's not the position that I want to be in or should

be in but the case presents it. In the face of an ineffective or defective process, there has to be a new process. But this much is clear to me, that number one, a private institution like B.C. should follow practices that we'll call fair process that are parallel to due process claims against public institutions and that that fair process directs that when credibility of a central issue in a case such as this is presented, the process has to enable the factfinder to evaluate the credibility of the respective claims by a real-time process at which both of the respective parties are present and have the opportunity to suggest questions. That wasn't provided here. And it is required I think to develop a fully satisfactory process.

I've thought about other shortcomings that I've talked about here. There wouldn't be enough for me to order a stay of the suspension. But this core question of credibility evaluation is. And it's for that reason fundamentally that I find a likelihood of success on the merits of demonstrating that the process that John Doe was subject to was deficient here. I would, with time enough, go into these other dimensions but I want to get out for the parties to evaluate and decide on their next steps the core of my concern.

I then turn to the question of the balance of hardships here by the suspension or staying it. The hardship to John Doe is clear that, while there is a pendency of this

litigation before it's fully resolved, he's going to be subject to the outcome that may effectively be overturned. It comes at a critical time in his development as a student. Every student is going through a critical time at the point that John Doe is in college. He has particular claims because of particular skills that he has [redacted] that justify consideration. But it's clear that he would suffer significant harm if the suspension were to go forward before there is a full resolution of this case.

I then turn to Jane Roe. She makes her claim. She's a vulnerable person. I don't want to overstate the difficulty of making claims like this and the terror that I'm sure it creates to pursue something like this, but the overarching concern is fairness. We have a fair process to evaluate the respective bona fides of the claim and to make a determination. And as I've said, there's a defectiveness in the process.

I've also considered whether the suspension just reinstates the developments here. It's not to hold against B.C. that they've done what they did, which was pursue, carefully I believe, the evaluation according to its defective system over an extended period of time. But this much is clear; that reinstating or otherwise declining to impose the suspension or continue it is not itself an unusual or untenable harm to Jane Roe; that it's been the status quo for a period of time while the university or the college pursues its

evaluation.

So I simply suspend the suspension, or stay it, and leave the parties in the same position they were in, which is awaiting a definitive resolution of the claims that she makes without causing any significant harm to Jane Roe.

I also considered the university's interests. The university's interests are real and must be given vindication. They are to establish an environment in which students feel protected and feel that they're going to get a fair shake and serve the larger educational purposes of the institution. But I'm satisfied that staying a suspension that seems improvident every bit as much serves those purposes as letting it go forward and waiting until afterwards to see whether it was right.

Then I turn to the question of irreparable harm. There are cases, there's no question about it, in which the courts have indicated that they don't consider being suspended for a period of time to be irreparable harm. I have to say that I have not found the analysis in those cases particularly compelling. It is very important at this stage in someone's life that a suspension not go forward when there is a question about its bona fides, as there is here. That affects someone's ability to get their education. That's real. That's cognizable. That's harm.

Here, there's more specific harm having to do with

opportunities [redacted]. That's real. It's cognizable and, in the absence of the stay of the suspension, would be visited upon John Doe. That's not to say that there has not already been and may continue to be harm visited on John Doe but, I don't mean to accelerate it until at least there is a process that is fair to him in evaluating his ability to continue at B.C.

So the short of it is that finding a substantial deficiency that grows out of Haidak and the teachings of Haidak, which frankly are consistent with what I've indicated what appears to be a developing law being synthesized as we speak by the ALI project, that there is likelihood to success on the merits. Second, that balancing the hardships, the hardship to him, that is, John Doe, would be significantly more than such hardship as may be visited upon either Jane Roe or Boston College, without minimizing the hardships to Jane Roe of continuing this procedure and perhaps or proceeding and perhaps difficulties that she may find with a modified procedure that involves real-time cross-examination in some form.

So then I turn to the question of what we should do from here. I've suspended or stayed the suspension. But that doesn't mean it's over. B.C. may pursue this issue but with a procedure that addresses the fundamental concern that I've indicated with this, that is, the lack of real-time evaluation, cross-examination, not in the traditional form but in some form

that is tailored to these circumstances. Second, because the investigators have already taken a position on this, it can't be the investigators that do this. Nor frankly do I think that those B.C. administrators who have touched this can.

We have a rule in this court, this district, that judges who have to deal with disputed issues of fact through trial or otherwise, but generally through trial, should not sit when a case is returned, and this is essentially returned to B.C. to develop a process that would be fair and impartial and appear to be fair and impartial, and continuing with the same group of actors or highly deferential actors would not serve that purpose.

Now, what do I have in mind? I'm not going to be prescriptive. I'm going to leave it to the parties to consult as to this. But there should be the opportunity for real-time cross-examination as an adjunct to the development of the evidence so far. There has been considerable work by the factfinder. A new factfinder should have the benefit of that, including the recommendation that was made by the investigators and embraced or at least adopted or at least approved under some standard that is elusive by the more senior people in the administration. So that's part of the record.

But there would be, in addition, a form of cross-examination. That at least to me seems -- real-time cross-examination. That, it seems to me, is the core of what

is necessary. There is the additional somewhat belated affidavit of the roommate. My view is that he purports to be a percipient witness and he also should be subject to some form of examination here in real time so that the new factfinder can make a fair determination that will be and will be perceived to be impartial.

But I outline that in the broad form to give the parties some idea of what I think they ought to be working toward to develop. I'll approve whatever is developed here, or more accurately review and carefully consider and ultimately fashion myself, as necessary, whatever is put forward by the parties.

I urge the parties not to engage in belly-bumping. This is a delicate area, and taking extreme positions is simply not the way to get the resolution. What we want here is a resolution that's fair to both the parties and does not compromise what are real concerns and issues about chilling the willingness of persons who face what they perceive to be sexual misconduct coming forward to raise the issue and seek vindication.

I've indicated as well that I want a form of redaction here because I think that it's a public matter and balancing between the confidentiality and related kinds of concerns for young people and in permitting the public to make a determination whether or not this process is fair and impartial

requires me to tell the parties in the first instance to go through a redaction process. I've already indicated what that should be for the filings. That is, it should use pseudonyms and abbreviations for individual witnesses and avoid particularity that might indirectly provide information about who it is who is litigating this case.

Now, I do that sua sponte. If confronted with some third party or intervene or who wants more information, I'll consider that, but I'm not presented with that. This much I know. I believe I have an obligation to ensure that it is as open as possible. And right now that seems to be the best way to deal with it, that is, the redaction mechanism of dealing with it.

I also have in mind that there's timing issues here. What I would benefit from from the parties is a submission that tells me where this case is going to go now. First makes proposals, if proposals are going to be made, of modifications to the process for the dispute between John Doe and Jane Roe. The parties may say, "No. You made a preliminary injunction ruling. We're going to go forward with full litigation over it. We think you're wrong," or wrong in some particular. That's fine, that's what you'll do. There may be appeal. That also may go on.

But I think that I would like to be able to move this case along promptly in any event to the degree that I have the

jurisdiction to do so with the benefit of the assistance of the parties about what I'm going to do here. Does it go to summary judgment in this setting? Is there, now having stayed the suspension, is there any prospect for damages in the case? All of those are open kinds of questions that I think you probably want to reflect on.

So what I'm going to do, unless the parties have some alternative, is to say that I would like by September 6 a proposal with respect to procedure. We'll have a scheduling conference to deal with that. I would hope that that proposal would also include proposals of remediation efforts that B.C. would undertake in its process to deal with this particular case. But I think the parties need some time to think about this and talk it through to make their determinations. This much is clear, that Mr. Doe is, pending further order of this or some other court, now free to return to B.C. on the terms and conditions that he was at B.C. throughout the development of the investigation and determination here.

I've felt the hot breath of the clock on my shoulder, so I've tried to be as concise, as complete as I can with respect to that. If there is something else that the parties would have, of course I reserve the right to tidy my findings and conclusions up, if necessary, but they are as reflected in the stenographer's notes of the hearing today.

Mr. Lapp.

MR. LAPP: I would just bring to the court's attention that in the exchange we've had with counsel about -- we haven't actually been served yet in a formal way, and what we've agreed is to, you know, we'll accept service. We'll waive the formal service of the summons. They'll send us a request to do that. And then under Rule 4, we would have 60 days to answer the complaint. I wanted to, A, just inform the court about that, when we might respond to the complaint. And then your remark about jurisdiction does bring a thought to mind, which is that I think the court has indicated not a very -- a disinclination to look favorably on the Title IX claim, which would be, if we were to move to dismiss that and that motion to dismiss the Title IX claim were allowed, I think that would be the end of the court's jurisdiction. I'm just thinking out loud here. I'm wondering if that was what the court was alluding to.

THE COURT: If that's what you want to do, I think that -- however, I would have supplemental jurisdiction that I'm likely to exercise here and keep jurisdiction over the case, having spent the time that I've spent on this and developed it in the way that it has been developed.

I make no final determination, but I think you can expect that that's what I would end up doing in this. I won't waste a lot of time. The parties may want to think about whether the claims ought to be stripped down in any event in this case on motion to dismiss practice. That's the least of

my concerns in some ways. What's important to me is that there be prompt resolution of the claim that Ms. Roe has made and that it be done in a fair way. And I would expect that B.C. would be interested in that as well. And certainly she would, and Mr. Doe would as well, although it raises some difficulties for him as I outlined here, but those are the difficulties that are presented by the litigation generally.

But I do want to see where the parties think this is going. And do you think it's going to go off on summary judgment? Do you think that there's going to be some other mechanism for dealing with it? I started by saying 1292(a)(1) says you can appeal to the First Circuit. Time is of the essence, and the time is even more compressed there. And no party is required to do that. I commit to dealing with this as promptly as I can, but I recognize that the parties have their own views about how they want to proceed. I just want to be sure I've got this front and center on the docket and I've got, to the degree that there's going to be another process that's being pursued, that I can help you shape that in a fashion that gets to establishing that remedial process in a way that I believe to be fair to the parties.

MR. BERNSTEIN: Your Honor, may I?

THE COURT: Yes.

MR. BERNSTEIN: Just a couple quick points. First, I know Your Honor is ordering that the case be unsealed and then

redactions. Is there a time period that Your Honor could keep it sealed while we do the redactions?

THE COURT: Yes. I'm not sealing the case. The docket is going to be clear. It may well be -- but it won't identify anybody. That's why I said that, you know, affidavit 1, affidavit 2, that those are the only two that I can spot reading the docket that would call out somebody to say, "Oh, I know who that guy is. That's the guy who does all the [redacted] stuff. Aha, this must be about a B.C. [redacted] Avoid that by just having the docket say only these filings, and the docket does not identify it. But it's open now because sealed means nobody sees it. Ms. Beatty has to tell you what's being filed, what actions are being taken. And in any event, it's improper, I think, to seal a case without something more than that. I've also told you that I want to have a process of redaction. We can talk about it on the 6th, but I think you better get on to it.

The first order of business is your memoranda ought to be redacted in a way that if somebody comes to court and says, "I want to know what this case is about," they're going to be able to tell what this case is about. So I urge you to do that. And then the fine points about this, we'll deal with.

MR. BERNSTEIN: That's what I was thinking. If someone came to court tomorrow and saw my client's declaration --

THE COURT: They won't see that until it's redacted.

MR. BERNSTEIN: Okay. They won't? Okay.

THE COURT: They will see that there are declarations. They will see that there's a complaint. They will see that there are motions for TRO and preliminary injunction. And I suspect that I will make open the rulings that I've made here. And I'll take a look at the transcript because I think I was -- and both of you, too -- careful not to identify what's going on, although there was some discussion about the [redacted] stuff, so maybe I'll keep that out. But at a minimum, my brief statement of reasons would be open as soon as it's in final form.

MR. BERNSTEIN: Number two, Your Honor, I don't know that B.C. would be difficult, but would Your Honor somehow direct them to some extent to assist my client with getting classes and getting enrolled in three days? A lot of classes are closed.

THE COURT: I don't know what that consists of. Is there really any problem with that?

MR. LAPP: I don't anticipate. We will serve this student as we serve any other student.

THE COURT: Just so that this is an unusual circumstance, he ought to have the -- be able to do that. I assume they'll do the best they can. My experience is that no student at the beginning of a semester thinks that things work

smoothly. This will be a little bit more difficult.

MR. BERNSTEIN: And the next to last, which should be no issue, is, Your Honor, prior to our coming here today we had conversations, emails with counsel for B.C. and they have agreed not to oppose our obligation to -- our application to dispense with the bond requirement of Federal Rule 65 associated with that. So I just wanted to put that on the record.

THE COURT: If the parties are satisfied on that -- part of my discussion about the question of irreparable harm went to, you know, what are the costs? I suppose there are some costs that could be assessed in this case, but I don't think they're meaningful.

MR. BERNSTEIN: And last but not least, Your Honor, with your ruling, with regards to what you envision this process and the findings, Your Honor, I would ask you to consider directing B.C. with the 65-page -- 63-page report of redacting the investigator's conclusions and findings because that clearly is going to -- could be prejudicial, and telling these new factfinders that they found responsibility, I don't have a problem with keeping the --

THE COURT: You know, you can take your respective positions. I'll tell you what I'm thinking about this as, the way I'm thinking about it is a report and recommendation from a magistrate. The magistrate tells me what I should do with the

order. Sometimes I agree. Sometimes I don't. An independent factfinder in this case will take what the magistrate, call investigator, has done, and then they're going to apply what I think is this additional element necessary of real-time cross-examination.

So I don't take a position on this. If the parties are in dispute about it, I'll look at it. But, you know, I search for analogies, as you have heard me, and one of those analogies is the magistrate judge.

MR. MILTENBERG: May I offer one, Your Honor? Andrew Miltenberg. It would seem to me that that would be the fruit of the poisonous tree.

THE COURT: I don't mean to tell you to save your breath, but I encourage you to do so, until we've gotten to a point where you talked about it. But fruit of the poisonous tree. No way.

Look, this morning, before you, I dealt with a motion to suppress. If I suppress, I'll be suppressing credible evidence of guilt. I know that. Is it going to make a difference to the criminal defendant who is being tried in front of me? I don't think so. I'll apply the rules. I assume that whoever is the factfinder here will apply the rules and the rules will be clear. But they have the benefit of the factfinding by the --

MR MILTENBERG: Would you allow us to continue a

discussion about it?

THE COURT: Absolutely. I'm just outlining what I'm provisionally thinking about. Maybe I'll find it persuasive. Maybe I won't. But I don't think a truly independent factfinder is going to be hung up on that.

MR MILTENBERG: My fear only is that the recommendations of the investigators are derived from the process which has been compromised in the way Your Honor --

THE COURT: It hasn't been compromised. I would say it's incomplete. Not compromised in that sense. They did investigations. But this is, again, analogy, this is me saying the FBI did an investigation. They talked to people. They went back and forth, and now they're recommending prosecution. Okay? They recommend prosecution. That doesn't mean they get it. So I'll look at it.

MR MILTENBERG: You'll give us another chance to persuade you otherwise?

THE COURT: I'm a member of the clean plate club. You will make a motion, and I'll try to consume it. It may not be nutritious, but I'll try to consume it.

MR MILTENBERG: Thank you, Your Honor.

THE COURT: Okay. Anything else? I think I will have a bare bones version of the order here, but I think I'm clear enough about what I've done so you know enough to know how to take your next steps. But I think a little bit of reflection

on this will be useful to the parties to figure out how we deal with this sort of thing.

Of course I've made this determination on likelihood of success on the merits. I haven't said that there's going to be success on the merits, but I've said that it's likely, and I think that likelihood is, as I've indicated, generated by my reading, which is perhaps not shared by everybody in the room. All right. If there's nothing further, we'll be in recess.

(Adjourned, 5:08 p.m.)

CERTIFICATE OF OFFICIAL REPORTER

I, Kelly Mortellite, Registered Merit Reporter and Certified Realtime Reporter, in and for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing transcript is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter to the best of my skill and ability.

Dated this 23rd day of August, 2019.

/s/ Kelly Mortellite

_____

Kelly Mortellite, RMR, CRR

Official Court Reporter